SERVED: April 6, 1994

NTSB Order No. EA-4137

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 30th day of March, 1994

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. SECURITY INVESTMENT BANCORP AND PATRIOT AIRLINES, INC., Respondents.[1]	)	Docket SE-12861 SE-12862

OPINION AND ORDER

The Administrator has appealed from the order of Administrative Law Judge Jerrell R. Davis, issued on April 6,

[1]Patriot is not a named respondent in the orders of suspension. Yet, even the Administrator so titles the proceeding and Patriot has participated in joint pleadings with Security. Our titling the proceeding as the law judge and the parties have titled it and our reference to both as respondents should not be read as a decision that Patriot has a right to participate in this case, whether as a respondent or an intervenor.

1993.[2] In that order, the law judge dismissed orders of the Administrator indefinitely suspending two airworthiness certificates of aircraft registered to Security and operated by Patriot.[3] The suspensions had been lifted and the airworthiness certificates returned but these proceedings continued, as the Administrator did not withdraw his orders and Security did not withdraw its appeal.

The substantive issue in this case is whether the aircraft were airworthy. It was (and is) the Administrator's burden to prove they were not. In their defense, respondents sought extensive discovery from the Administrator via document production and interrogatories. Although the Administrator offered the argument that discovery is not available in emergency proceedings (a position we consistently reject), he also provided considerable response in the form of documents and answers to interrogatories, and later supplemented his response with additional material. There were, however, responses that Security found unsatisfactory, and there were charges of improper delay by the Administrator. See Administrator's February 3, 1993

[2]The law judge's order is attached. Respondents have filed a motion for oral argument on this matter, seeking the opportunity to address the Board directly in opposition to the Administrator's appeal. The Administrator sees no need for oral argument and we agree.

[3]The orders were issued under the Administrator's emergency authority, but the emergency was waived by respondents and, therefore, the deadline for handling emergency proceedings does not apply.

Response to Motion to Compel; to Stay Proceedings and Sanctions.[4]

The law judge, on February 8, 1993, found complainant's responses to discovery unacceptable and directed that the Administrator "either produce, or provide a legal excuse for not producing, the documents. . .". The law judge further ordered:

> that Complainant's unexplained failure to produce documents and answers to interrogatories, as ordered herein, or to provide a legal excuse for his failure to do so, shall preclude complainant, at the scheduled hearing, from offering into evidence any oral or documentary evidence pertaining directly to any of the subject matters covered in respondents' requests and interrogatories.

Emphasis added.

In response to this order, the Administrator offered no new material. Instead, he reviewed and discussed the materials he had already produced and renewed his various objections.[5] The law judge, by his order of April 6, 1993 under review here, granted a motion by respondents, based on the Administrator's alleged failure to comply with the February order, to dismiss the proceeding.

The Board recognizes the difficult task before our law judges in resolving complex discovery disputes, and notes that

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[4]For example, respondent contended that the Administrator failed to specify the expertise of each identified, potential witness, instead identifying the issues and stating, generally, that the witnesses would be testifying about them, and failed to provide details of each witness's background and experience.

[5]Concurrently, the Administrator filed his own motion to compel and request for sanctions, on the ground that respondent had failed to respond to the Administrator's requests for discovery. The law judge summarily denied that motion and that matter has not been raised on appeal.

each law judge has considerable discretion in the conduct of hearings. Furthermore, the law judge has authority derived from our rules (see 49 C.F.R. 821.19(b) and 821.35) to sanction a failure to comply with his discovery orders. Thus, our inclination would be to defer to his judgment regarding the appropriate sanction.

In this case, however, we are unable to do so because the law judge's action was facially inconsistent with his own earlier order, and failed to provide the Administrator proper notice. The underlined portion of the law judge's February order stated that, if the Administrator's response was not satisfactory, the Administrator would be precluded "from offering into evidence any oral or documentary evidence pertaining directly to any of the subject matters covered in respondents' requests and interrogatories." Consequently, we may not affirm the law judge's dismissal of the case and must remand for further proceedings.[6]

[6]If the law judge chooses to modify his latest order to preclude the introduction, at the hearing, of certain evidence, the Administrator (and this Board, should the issue be appealed) are entitled to the benefit of the law judge's reasoning regarding the inadequacy of the Administrator's discovery responses and objections. As it is the cursory nature of the law judge's April 6 order that necessitates our action here, we urge a thorough and detailed explanation by the law judge.

We also suggest two other courses that the law judge may consider. First, there appears to be considerable merit in proceeding to a hearing on the merits at this time and without further discovery, subject of course to the possibility that evidentiary issues that might arise could be resolved at trial. Second, we urge the law judge to seek comment from the parties on why this proceeding and the Administrator's order should not be dismissed as moot. The involved airworthiness certificates are

ACCORDINGLY, IT IS ORDERED THAT:

This proceeding is remanded to the Administrative Law Judge for further proceedings as set forth in this opinion.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order. Chairman VOGT submitted the following concurring statement.

(..continued)
no longer under suspension, and the Board is not in the habit of offering declaratory judgments on moot issues.

Administrator v. Security Investment Bancorp and Patriot Airlines, Inc., Notation 6190
Concurring Statement of Chairman Vogt

I agree that the case should be reversed and remanded because the law judge's dismissal order was inconsistent with his earlier order. I would also note, however, that the law judge was required, pursuant to the Administrative Procedure Act, to provide the reasons or bases for his rulings. 5 U.S.C. 557 (c). In his February 8, 1993, order the law judge gave no reasons for finding the Administrator's discovery responses inadequate. Likewise, in his April 6, 1993, order the law judge gave no reasons for dismissing the case. By not providing the bases for his orders, the law judge failed to comply with the Administrative Procedure Act, and issued orders which cannot adequately be reviewed on appeal. On this additional ground, the case should be reversed and remanded for further proceedings.

In my view, the Board should limit its opinion to resolving the issues raised on appeal and any other issues which it deems important to a proper disposition of the proceeding. See 49 C.F.R. 821.49. The gratuitous advice offered by the majority in footnote six does not meet this criteria.